

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 25, 2007

GARY JORDAN v. HOWARD CARLTON, WARDEN

Appeal from the Criminal Court for Johnson County

No. 4760 Robert E. Cupp, Judge

No. E2006-00206-CCA-R3-HC - Filed June 27, 2007

The petitioner, Gary Jordan, appeals the Johnson County Criminal Court's denial of his petition for writ of habeas corpus. The petitioner alleges that his sentences for second degree murder and attempted second degree murder were imposed illegally because the trial court ordered them to be served concurrent with a prior unserved sentence for which he was on probation and because he was on bond for probation violations at the time of the commission of the new offenses. The trial court found that the petition failed to state a cognizable claim for relief upon which a petition for a writ of habeas corpus could issue. Following our review, we affirm the trial court's dismissal of the petition for habeas corpus relief.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

Gary Jordan, pro se, Mountain City, Tennessee.

Robert E. Cooper, Jr., Attorney General & Reporter, Leslie E. Price and David E. Coenen, Assistant Attorneys General, for the appellee, State of Tennessee.

OPINION

The petition for writ of habeas corpus alleges that the petitioner was charged with two counts of first degree murder and two counts of attempted first degree murder in January 1996. At the time of these offenses, the petitioner was serving a three-year sentence on probation for a 1994 aggravated assault conviction. Additionally, the petition alleges that the petitioner had been arrested for five probation violations and had posted bond for the violations at the time of the commission of the January 1996 offenses. On January 23, 1997, the petitioner pled guilty to one count of second degree

murder and one count of attempted second degree murder. The trial court imposed a sentence of fifteen years as a Range I, standard offender for the second degree murder conviction and ten years as a Range I, standard offender for the attempted second degree murder conviction to be served consecutively to one another but concurrent with the previously imposed sentence for the 1994 aggravated assault. The petitioner alleges that his sentences are illegal because they should have been imposed consecutive to the previously imposed unserved sentence for the aggravated assault. He also alleges that consecutive sentences were mandatory because he was on bond for probation violations when the 1996 offenses were committed. The state asserts that the trial court properly imposed the new sentences concurrently with the prior unserved aggravated assault sentence and that the petitioner's bond status for multiple probation violations did not implicate the mandatory consecutive sentencing provisions of Tennessee Rules of Criminal Procedure 32(c)(3)(c) and Tennessee Code Annotated § 40-20-111(b).

ANALYSIS

Tennessee law provides that “[a]ny person imprisoned or restrained of his liberty under any pretense whatsoever . . . may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment.” Tenn. Code Ann. § 29-21-101. Habeas relief is limited and available only when it appears on the face of the judgment or the record of proceedings that a trial court was without jurisdiction to convict the petitioner or that the petitioner's sentence has expired. Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007); Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004) (citing Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993)). To prevail on a petition for writ of habeas corpus, a petitioner must establish by a preponderance of the evidence that a judgment is void or that a term of imprisonment has expired. See State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964). If a petition fails to state a cognizable claim, it may be dismissed summarily by the trial court without further inquiry. Hickman, 153 S.W.3d at 20; see also State ex rel. Byrd v. Bomar, 214 Tenn. 476, 483, 381 S.W.2d 280, 283 (1964); Tenn. Code Ann. § 29-21-109.

We note that the determination of whether to grant habeas corpus relief is a matter of law; and, therefore, we will review the trial court's finding de novo without a presumption of correctness. McLaney v. Bell, 59 S.W.3d 90, 92 (Tenn. 2001). In denying relief without an evidentiary hearing, the trial court found that the judgments under attack were not void on their face and that the mandatory consecutive sentencing procedure of Rule 32(c)(3)(c) was not triggered by the commission of the present offenses while on bond for probation violations arising from a previously imposed conviction and sentence of probation. Initially, we note that the imposition of the petitioner's sentence concurrent with the prior unserved sentence for aggravated assault was appropriate pursuant to Tennessee Rules of Criminal Procedure 32(2)(A). Furthermore, we agree with the trial court that the petitioner's bond status for pending probation violations did not render consecutive sentences mandatory because the probation violations did not result in additional convictions, but rather resulted in a revocation of the probation on the aggravated assault sentence and the requirement that the previously imposed three year sentence for aggravated assault to be served in custody. Therefore, the petitioner has failed to show any illegality of the sentences imposed and is not entitled to habeas corpus relief.

CONCLUSION

Based upon the foregoing and after a full consideration of the record, arguments of counsel and applicable law, this court concludes that the petitioner has failed to establish that he is entitled to habeas corpus relief. Therefore, the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE